

# SENATE NO. 686

**AN ACT** ESTABLISHING AND EVALUATING AN ADMINISTRATIVE MEDICAL LIABILITY SYSTEM TO RESTORE FAIRNESS AND RELIABILITY TO THE MEDICAL JUSTICE SYSTEM; PROMOTING PATIENT SAFETY BY FOSTERING ALTERNATIVES TO THE CURRENT MEDICAL TORT LITIGATION

*Be it enacted by the Senate and House of Representatives in General Court assembled,  
And by the authority of the same, as follows:*

1 SECTION 1. Notwithstanding the provisions of any other general or special law to the contrary,  
2 there is hereby established an administrative medical liability system demonstration program.

3 Section 1. Short Title. This act shall be known as the Administrative Medical Liability System  
4 Demonstration Act.

5 Section 2. Purpose. The purpose of this act is to authorize the establishment of a demonstration  
6 program to examine an administrative medical liability system in this Commonwealth. The  
7 program is intended to help determine whether the implementation of such a system would confer  
8 the following benefits:

9 (A) Reduce the time necessary to compensate injured patients;

10 (B) Expand the number of patients that may receive compensation or other settlement for a  
11 medical injury;

- (C) Establish a more fair, predictable and uniform system of payments for patients with similar medical injuries;
- (D) Encourage better exchange between and among health care providers and patients regarding preventable medical errors, consistent with the goals of enhancing patient safety;
- (E) Reduce legal fees and administrative costs; and
- (F) Promote patient safety by identifying preventable errors and developing changes to reduce their incidence in the future.

### Section 3. Definitions

The following words and phrases when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

“Administrative Medical Liability System Commission,” is the commission established pursuant to this act that is responsible for the demonstration program.

“Affiliated Physicians,” the physicians that have privileges at participating providers.

“Avoidable medical injury”, a medical adverse event that would not have resulted if care had been delivered in a manner consistent with that of an experienced practitioner or specialist in the relevant clinical area. In making the determination of avoidability, the lack or presence of local or regional resources may be taken into account.

"Health care", care, service, or procedure provided by a health care provider or by an individual working under the supervision of a health care provider:

- (1) to diagnose, treat, or maintain a patient's physical or mental condition, disease or impairment; or

(2) the assessment of the health of human beings that affects the structure or any function of the human body. Labor and delivery, whether complicated or uncomplicated, shall be included in this definition.

"Health care facility", a hospital, clinic, office, or similar place, where a health care provider provides health care to patients. It shall not mean a nursing or convalescent home or institution.

"Health care information", information, whether oral or recorded in a form or medium that identifies or can readily be associated with the identity of a patient and relates to the patient's health care. The term shall include a record of disclosures of health care information.

"Health care provider", a person who is licensed, certified, or otherwise authorized by law of the commonwealth to provide health care in the ordinary course of business or practice of a profession. The term shall not include a person who provides health care solely through the sale or dispensing of drugs or medical devices. The term also includes the following:

(1) an officer, employee, or agent of a health care provider acting within the scope of the person's duties and authority, and

(2) a legal entity through which 1 or more health care providers deliver health care, including, but not limited to, a professional corporation, a partnership, or limited liability company.

"Hospital", an institution where sick or injured patients are provided medical care and which is operated in accordance with the laws of the jurisdiction in which it is located pertaining to institutions identified as hospitals, and which is primarily engaged in providing to patients on an inpatient basis diagnostic and therapeutic facilities for surgical or medical diagnosis, treatment, or care of injured or sick persons by or under the supervision of a staff of duly licensed doctors

of medicine, and which is not, other than incidentally, a nursing or convalescent home or institution.

"Maintain", as related to health care information, means to hold, possess, preserve, retain, store, or control that information.

"Medical adverse event", an incident in which harm has resulted or could have resulted from malpractice, negligence, error, omission, mistake, or the unauthorized rendering of professional services to a person receiving health care services.

"Medical professional liability claim", a claim brought by or on behalf of an individual seeking damages for loss sustained by the individual as a result of an injury or wrong to the individual or another individual arising from a health care provider's provision of or failure to provide health care regardless of the theory of liability. A medical professional liability claim includes, but shall not be limited to, a claim grounded in negligence, informed consent, breach of contract, misrepresentation or fraud. It does not include an action at law for claims of sexual misconduct, wanton or willful acts with intent to harm the patient, criminal offenses, premises liability for injuries not occurring in connection with health care, product liability against a manufacturer or distributor, or liability for wrongful denial of coverage by a health insurer.

"Patient", an individual who receives or has received health care. The term includes a deceased individual who has received health care. The term includes both newborn and stillborn infants.

"Person", an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

"Program," the demonstration program established pursuant to this act.

Section 4. Administrative Medical Liability System Commission.

(a) Membership – The Commission shall consist of the following members:-

The chief justice of the supreme judicial court, or his designee;

The attorney general, or his designee; who shall serve as the chairperson of the commission;

The commissioner of insurance;

Two individuals appointed by the governor with academic and research expertise in the medical liability system;

A member of the Massachusetts Association of Trial Attorneys;

A member of the Massachusetts Medical Society;

A member of the Massachusetts Hospital Association;

A member of the Boston Bar Association Health Law Section;

Three members of the Senate, two of whom shall be appointed by the President of the Senate and one of whom shall be appointed by the Senate Minority Leader;

Three members of the House of Representative, two of whom shall be appointed by the Speaker of the House of Representatives, and one of whom shall be appointed by the House Minority Leader.

(b) Staff and support shall be provided by the Executive Office of Health and Human Services.

(c) The Commission shall cease to exist upon issuance of its final report to the General Court.

#### Section 5. Demonstration Program.

(a) The commission is authorized, subject to appropriation, to award up to three demonstration grants for a period of not more than five years to hospitals and their affiliated physicians for the development, implementation and evaluation of alternatives to the current tort litigation for resolving disputes over injuries allegedly caused by hospitals or physicians.

(b) Any hospital and its affiliated medical staff may participate in the program by meeting the following criteria: -

- (i) The hospital's primary coverage is self-insured;
- (ii) The hospital and its medical staff agree to disclosure of incidents and serious events, in accordance with current law;
- (iii) The hospital and its medical staff agree to a uniform and comprehensive risk management plan;
- (iv) The hospital and its medical staff agree to a joint defense agreement;
- (v) The hospital and physician's insurance carriers, including risk retention groups and similar organizations agree to participate in the program.

#### Section 6. Description.

(a) Compensation to patients – all patients who suffer temporary or permanent injury as a result of an avoidable medical error by a participating hospital or physician shall be compensated for economic and non-economic damages. Independent medical experts shall be consulted in specific cases to determine compensable injuries. The independent medical experts shall meet the qualification requirements of this act.

(b) Determination of Compensation – Participating hospitals and physicians and patients shall agree to a uniform schedule of compensation for injuries based on type of injury, severity of the injury, age, life expectancy, past and future wages. Eligible claims shall be paid in a uniform manner using a fixed benefits schedule and shall include compensation for both economic and non-economic losses.

123 (c) Early offers – Participating health care providers shall offer early mediation  
124 following disclosure of an avoidable error.

125 (d) Independent Panel – Each eligible claim shall be submitted to an independent  
126 panel. Each panel is composed of three individuals selected at random from  
127 an approved list. If any of the selected panel members has a relationship with  
128 the patient or the health care provider involved in the particular case, he or she  
129 shall be disqualified, and another panel member shall be selected at random.  
130 The commission established by this act shall determine the qualifications of  
131 eligible panelists. Each panel will consult one or more qualified medical  
132 experts from the approved list to determine if the patient is eligible for  
133 compensation. If there is disagreement among the medical experts, the panel  
134 shall make a final ruling consistent with general accepted medical standards  
135 and practices. All decisions of the independent panel shall be in written form.

136 (e) Administration – The participating health care providers, with the approval of  
137 the commission, shall appoint an independent administrator. The independent  
138 administrator is responsible for the following:-

- 139 a. Recruitment and maintenance of qualified medical experts.
- 140 b. Recruitment and maintenance of the qualified independent panelists.
- 141 c. Collection of documents needed to determine if a claim is compensable.
- 142 d. Selection of the independent panel.
- 143 e. Determination of compensation based on the opinion of the independent panel and  
144 the adopted uniform schedule of compensation.
- 145 f. Ensuring proper payments are made to the claimant.

- 146 g. Approval of any agreement for binding arbitration between the patient and the  
147 participating health care providers.
- 148 h. Developing analysis and feedback to the participating providers for improving care  
149 processes and reducing the incidence of avoidable errors.
- 150 i. Administration of the arbitration program.
- 151 (f) Patient Participation – Patients shall opt into the program prior to or at the  
152 point of care. At a minimum, the opt-in process shall become an integral part  
153 of participating physician and hospital’s informed consent policies and  
154 procedures. A patient opts into the program by accepting a written agreement.  
155 If the patient agrees to the agreement, he or she agrees to accept the  
156 determination of the independent panel. The decision of the independent  
157 panel is final, legally binding and enforceable in court.
- 158 (g) Incentives – The Commonwealth should ensure that all participating  
159 physicians and hospitals are held harmless for incurring any costs that exceed  
160 a predetermined amount prior to the start of the program through the  
161 reinsurance program established in this act.
- 162 (h) Term – All participating physicians and hospitals must agree to participate for  
163 a minimum of three years. The demonstration program should be at least five  
164 years.
- 165 (i) Costs – The participants and the Commonwealth will share the costs of  
166 operating the administration system during the demonstration period. If the  
167 program continues beyond the demonstration period, all costs are the  
168 responsibility of the participating health care providers. Compensation to



169 patients is the responsibility of the participating physicians and hospital's  
170 health care providers. In every action for malpractice, negligence, error,  
171 omission, mistake or the unauthorized rendering of professional services  
172 against a provider of health care, if the independent panel awards damages to  
173 the patient, it shall find the total amount of damages, and specify the  
174 applicable elements of special and general damages upon which the award of  
175 damages is based and the amount of the total damages assigned to each  
176 element, including, but not limited to:

177 (1) Amounts intended to compensate the patient for reasonable expenses  
178 which have been incurred, or which will be incurred, for necessary medical, surgical, X-ray, dental,  
179 or rehabilitative services, including prosthetic devices; necessary ambulance, hospital and nursing  
180 services; drugs; and therapy;

181 (2) Amounts intended to compensate the patient for lost wages or loss of  
182 earning capacity and other economic losses which have been incurred or will be incurred; and

183 (3) Amounts intended to compensate the patient for pain and suffering, loss  
184 of companionship, embarrassment, and other items of general damages, which have been incurred  
185 or will be incurred in the future, and whether there is a substantial or permanent impairment of a  
186 bodily function, or substantial disfigurement, or other special circumstances in the case which  
187 warrant a finding that imposition of the limitation specified in section sixty I of chapter 231 of the  
188 general laws would deprive the patient of just compensation for the injuries sustained.

189 Each element shall be further itemized into amounts intended to compensate for damages which  
190 have been incurred prior to the verdict and amounts intended to compensate for damages to be  
191 incurred in the future. In itemizing amounts intended to compensate for future damages, the court  
192 shall set forth the period of weeks, months or years over which such amounts are intended to  
193 provide compensation.

194 (j) Attorney fees. – Fees to any attorney retained by the patient shall be limited to  
195 20% of the total award.

196 Section 7. Requirements.

197 (a) Each entity desiring a grant may establish a scope of jurisdiction, such as a designated  
198 geographic region, a designated area of health care practice or a designated group of  
199 health care providers or health care organizations, for the proposed alternative to  
200 current tort litigation that is sufficient to evaluate the effects of the alternative.

201 (b) Notification of patients. – An entity proposing a scope of jurisdiction shall  
202 demonstrate how patients would be notified that they are receiving health care  
203 services that fall within such scope.

204 Section 8. Application.

205 (a) Each entity desiring a grant under section 4 shall submit to the commission an  
206 application, at such time, in such manner and containing such information as the  
207 commission may require.

208 (b) Review Panel:-

209 (1) In reviewing application under subsection (a), the commission shall consult with  
210 a review panel composed of relevant experts appointed by the commission.

211 (2) The panel shall be composed as follows:

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(i) The commission shall solicit nominations from the public for

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individuals to serve on the review panel.

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(ii) The commission shall appoint at least 11, but not more than 15 highly

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qualified and knowledgeable individuals to serve on the review panel

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and shall ensure that the following entities receive fair representation:

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(A) Patient Advocates.

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(B) Health Care providers and health care organizations.

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(C) Attorneys with expertise in representing patients and health care

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providers.

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(D) Insurers.

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(E) State Officials.

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(iii) Chairperson – A person designated by the commission shall be the

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chairperson of the review panel.

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(iv) Availability of information – The commission shall make available to

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the review panel such information, personnel, and administrative

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services and assistance as the review panel may reasonably require to

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carry out its duties.

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(v) Information from agencies – The review panel may request directly

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from any department or agency of the Commonwealth any information

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that such panel considers necessary to carry out its duties. To the extent

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consistent with applicable laws and regulations, the head of such

234 department or agency shall furnish the requested information to the  
235 review panel.

236 (vi) Report – Each entity receiving a grant under subsection (a) shall submit  
237 to the commission a report evaluating the effectiveness of the activities  
238 funded with grants awarded under subsection (a) at such times and in  
239 such manner as the commission may require.

240 (vii) Technical assistance – The Division of Health Care Finance and Policy  
241 shall furnish technical assistance to the entities awarded grants under  
242 this act. Technical assistance shall include:

243 1. The development of a defined payment schedule for non-  
244 economic damages, including guidance on the consideration of  
245 individual facts and circumstances in determining appropriate  
246 payment, the development of classes of avoidable injuries and  
247 guidance on early disclosure to patients of adverse events.

248 2. The development of common definitions, formats, and data  
249 collection infrastructure for participating providers receiving  
250 grants under this section to use in reporting to facilitate  
251 aggregation and analysis of data statewide.

## 252 Section 9. Evaluation.

253 (a) The commission, in consultation with the review panel established under this act, shall enter  
254 into a contract with an appropriate research organization to conduct an overall evaluation of  
255 the effectiveness of grants awarded under this act and to annually prepare and submit a  
256 report to the secretary of health and human services and to the joint committee on health care

financing, the joint committee on the judiciary, and the house and senate committees on ways and means. Such an evaluation shall begin not later than 18 months following the date of implementation of the first program funded by a grant under this act.

(b) Contents. – The evaluation under subsection (a) shall include:

- 1) An analysis of the effect of the alternative system on the number, nature, and costs of health care liability claims.
- 2) A comparison of the claim and cost information of each entity receiving a grant.
- 3) A comparison between entities receiving a grant under this section and entities that did not receive such a grant, matched to ensure similar legal and health care environments and to determine the effects of the grants and subsequent reforms on:
  - (i) The liability environment.
  - (ii) Health care quality.
  - (iii) Patient safety.
  - (iv) Patient and health care provider satisfaction with reforms.

#### Section 10. Administrative Medical Liability Reinsurance Fund

The Massachusetts Medical Liability Reinsurance Plan authorized pursuant to the provisions of section 193U of chapter 175, is authorized to serve as a reinsurance fund for paying claims under this section. For participating providers, the Massachusetts Medical Liability Reinsurance Plan shall accept independent panel decisions and pay its assigned share of damages up to its statutory incident and aggregate limits. The plan shall equally assess the participating provider and the Commonwealth for any claims. For purposes of this section, the share of claims attributable to the Commonwealth shall be paid in the same manner as claims against the commonwealth, and the

279 state treasurer shall pay the amount out of the assurance fund, without any further act or resolve  
280 making an appropriation therefor.

281 Section 11. Confidentiality.

282 Disclosure of documents used in the program shall be deemed protected as products of a peer  
283 review committee pursuant to section 204 of chapter 111 of the general laws. All participating  
284 health care providers shall be provided maximum protection to conduct peer review.

285 Section 12. Appropriation.

286 There is authorized to be appropriated to carry out this section such sums as may be necessary.  
287 Amounts appropriated pursuant to this section shall remain available until expended. The  
288 commission may seek federal and private funds to carry out the purposes of this act.

289 SECTION 2. This act shall take effect six months after passage.